

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Creation of a Low)	MM Docket No. 99-25
Power Radio Service)	

To: The Commission

COMMENTS

Edgewater Broadcasting, Inc. (“EB”) and Radio Assist Ministry, Inc. (“RAM) (together with EB, the “Ministries”), hereby submit their comments to certain technical issues related to low power FM (“LPFM”) raised in *Creation of Lower Power Radio Service, Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket No. 99-25, FCC 05-75, released March 17, 2005 (the Further Notice of Proposed Rulemaking portion hereafter “*FNPRM*”).¹ The following is respectfully submitted:

Background

1. The Ministries are each Idaho non-profit corporations. The Ministries are dedicated to building out a nation wide translator network to provide Christian programming to under-served areas or areas without significant sources of this type of programming. The Ministries use their broadcast facilities to provide news, public affairs, information and entertainment programming with a Christian message to their communities of license. RAM’s focus is on talk and educational programming as well as assisting other broadcasters with these formats. EB’s mission focuses on construction of the network and bringing new service to the communities of

¹ The *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* was published in the Federal Register on July 7, 2005. 70 Fed. Reg. 39182 (July 7, 2005) (*Second Order* portion); 70 Fed. Reg. 39217 (July 7, 2005) (*Further Notice of Proposed rulemaking* portion setting the due date for comments as August 8, 2005). On August 3, 2005, the FCC released an Order extending the due date for filing comments to August 22, 2005. *Order*, DA 05-2253, released August 3, 2005. Accordingly, these Comments are timely.

license. The Ministries are also dedicated to assisting other Christian broadcasters, both new entrants and incumbents, with their missions including multilingual, educational and inspirational programming.

2. As will be demonstrated herein, FM translator and LPFM facilities are not necessarily mutually exclusive and can co-exist in the FM band, both technically and from a policy standpoint, as important services serving under-served communities and constituencies. Both services advance the public interest in their own unique way and are important parts of the variety of radio services providing news, public affairs, information and entertainment programming to the public from their unique perspectives.

3. On March 17, 2005, the Federal Communications Commission (“FCC” or “Commission”) released the *FNPRP* seeking comment on a variety of technical and ownership issues related to LPFM. Among other issues, the FCC sought comment on the following licensing rule changes to resolve the competing demands by FM translator and LPFM stations for the same limited spectrum (which are addressed by the Ministries below):

Interference Protection Requirements

- Should LPFM applications be treated as having “primary” status over prior-filed FM translator applications and existing FM translator stations? If so, under what conditions?
- Should all LPFM applications have primary status because they are permitted to originate local programming? Or, should primary status be limited to applicants that pledge to provide at least eight hours of local originated programming per day?
- Should the FCC provide “grandfathered” protection to certain classes of FM translator stations such as those already licensed and operating, those licensed prior to the adoption of the *LPFM Report and Order*² in the LPFM proceeding,

² *Creation of Low Power Radio Service, Report and Order*, 15 FCC Rcd 2,205 (2000) (“*LPFM Report and Order*”).

those currently authorized like the construction permits issued to the applicants in the 2003 FM Translator Filing Window,³ and/or those providing fill-in service?

- Should the FCC dismiss all pending applications for new FM translator stations and require re-filers to be subject to the results of this proceeding?
- Should the FCC dismiss all of the pending mutually exclusive FM translator applications?

Protection From Subsequently Authorized Full Service FM Stations

- Should LPFM stations be allowed to operate even if there is predicted interference within the 70 dBu contour of an “encroaching” second- or third-adjacent channel full service FM station?

Comments

4. LPFM applications should not be treated as having primary status over existing FM translator stations or prior-filed FM translator applications. Primary status for LPFM status is not warranted given the earlier lack of demand for spectrum by LPRM proponents. Contrary to the unsubstantiated assertions of LPFM proponents, LPFM proponents had ample opportunity to file for LPFM stations on non-reserved channels *prior* to the opening of a window for the filing of new and major change applications for FM translator stations, the very same FM translator stations which LPFM proponents erroneously allege prohibits them from obtaining additional LPFM stations. On November 26, 1997, the Commission imposed a freeze on the filing of new and major change applications for FM translators.⁴ The freeze was in effect for over five years

³ The FCC opened a filing window on March 10, 2003 for the submission of certain FM translator applications (“2003 FM Translator Filing Window”). FCC Public Notice entitled “FM Translator Auction Filing Window and Application Freeze,” DA 03-359, rel. February 6, 2003 (opening an auction filing window from March 10, 2003 and closing on March 14, 2003 for the filing available non-reserved band new and major change applications for FM translator stations, and announcing the eligibility of certain pending FM translator applications to participate in the window). Subsequently, the FCC extended the closing date of this filing window to March 17, 2003. FCC Public Notice entitled “FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003,” DA 03-633, released March 5, 2003.

⁴ *Implementation of Section 309(j) of the communications Act - Competitive Bidding for Commercial Broadcast and Instructional Fixed Service Licenses, Notice of Proposed Rulemaking*, 12 FCC Rcd 22363, 22388 (released November 26, 1997).

until March 10, 2003, when the Commission opened an auction filing window for the submission of certain FM translator applications (“2003 FM Translator Filing Window”).⁵ With respect to new 100 watt LPFM stations (“LP100”), the Commission announced a five-stage national filing window for the filing of 100 watt LPFM applications on March 17, 2000, which divided the U.S. and its territories into five groups for filing purposes.⁶ The first of the five LPFM filing windows opened on May 30, 2000 and the last of the five LPFM filing windows opened on June 11, 2001,⁷ at least 19 months *before* the FCC even opened the 2003 FM Translator Filing Window on March 10, 2003. Any frequency that was available in the 2003 FM Translator Filing Window (that were suitable for LPFM stations based on the LPFM service’s distance separation requirements) were available to the proponents of LPFM stations well *before* the frequencies were made available to FM translator applicants in the 2003 FM Translator Filing Window. Thus, the proponents of LPFM stations had ample opportunity to file for LPFM stations on these available frequencies but failed to do so. They were not precluded from doing so by the FM Translator Window.

5. An analysis of existing FM full power radio stations, existing FM translator stations, and existing LPFM stations (i.e., LP100 stations) as compared to FM translator facilities resulting from the 2003 FM Translator Filing Window clearly shows that LPFM proponents continue to have ample opportunity throughout the United States to locate LP100 stations when the

⁵ FCC Public Notice entitled “FM Translator Auction Filing Window and Application Freeze,” DA 03-359, rel. February 6, 2003 (opening an auction filing window from March 10, 2003 and closing on March 14, 2003 for the filing available non-reserved band new and major change applications for FM translator stations, and announcing the eligibility of certain pending FM translator applications to participate in the window). Subsequently, the FCC extended the closing date of this filing window to March 17, 2003. FCC Public Notice entitled “FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003,” DA 03-633, released March 5, 2003.

⁶ FCC Public Notice entitled “FCC Announces Five-State National Filing Window for Low Power FM Broadcast Station Applications,” DA 00-621, released March 17, 2000.

⁷ See FCC Public Notices entitled “Low Power FM Filing Window,” DA 00-914, DA 00-1697, DA 00-2831, and DA 01-904, released April 28, 2000, July 28, 2000, December 15, 2000, and April 10, 2001, respectively.

Commission opens a new window for such facilities. *See* Maps attached as Exhibits 1 and 2; *see* Summary, Important Notes, and Study Procedure attached as Exhibit 3.⁸ As demonstrated in Exhibits 1 through 3, the areas that are in dark green show the areas in the United States where proponents of LPFM stations may locate LP100 stations. As you can see, area where preclusion exists (the red area) is miniscule. Moreover, as discussed above, proponents of LPFM did not file any applications to locate LP100 stations in the red areas. *See* discussion *supra* at para. 4. Accordingly, the Auction 83 FM Translator Facilities located within the red areas broadcast on frequencies that no proponent of LPFM wanted! If any proponent of LPFM stations would have filed for a LP100 stations within the red areas, the licensee/permittee of the particular Auction 83 FM Translator Facility in that area would have been precluded from filing for that particular Auction 83 FM Translator Facility by the LP100 station. *See* 47 C.F.R. 74.1204.

6. As noted, the red areas show the very limited areas where proponents of LPFM stations are precluded from locating a transmitter site for a LP100 station due to singleton applications filed in the 2003 FM Translator Filing Window. Notwithstanding an LP100's inability to locate a transmitter in those areas, some portion of the area could still be served by an LP100 station located adjacent thereto. Thus, it is abundantly clear that the proponents of LPFM stations have no basis for complaining that the 2003 FM Translator Filing Window or the resulting Auction 83 FM Translator Facilities eliminated the opportunity for proponents of LPFM stations to file for LPFM stations in the United States. Neither the Ministries nor any other 2003 FM Translator Filing Window applicant can be held responsible for the failure of LPFM proponents to take advantage of the opportunities that existed during the LPFM filing windows. Furthermore, on a going forward basis, neither the Ministries nor any other 2003 FM Translator Filing Window

⁸ Exhibit 1 shows the effect of all Auction 83 singleton applications filed in the 2003 FM Translator Filing Window, while Exhibit 2 shows the effect of the Ministries' singleton applications filed in the 2003 FM Translator Filing Window.

applicant should be penalized for properly and timely filing during Auction 83. The alleged preclusion simply does not justify the draconian actions requested by the LPFM proponents.

7. The FCC must also not disregard the substantial expectancy interests of FM translator licensees, permittees, and applicants (regardless of whether the FM translator facility was part of the 2003 FM Translator Filing Window) who have been fully compliant with the Communications Act as well as all of the existing rules, regulations, and policies of the FCC. The FCC has recognized the legitimacy of the expectancy interests of existing owners in a variety of contexts. For example, following its 2002 biennial review, the FCC grandfathered existing television, radio, and television/radio station combinations that violate the FCC's new local ownership limits in order to avoid imposing an unfair hardship. *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13,620, at paras. 147, 484-486 (2003) (“*Ownership Report and Order*”). Sensitive to concerns over preserving the value of the investments made by existing licensees in reliance of the FCC's then-current rules and policies, the FCC decided to grandfather existing television, radio, and television/radio station combinations that violate the FCC's new local ownership limits to prevent “unfairly penaliz[ing] parties who bought stations in good faith in accordance with the Commission's rules.” *Id.* at para. 484. Similarly, equity and fair play demands that the FCC must also protect the substantial expectancy interests of FM translator licensees, permittees, and applicants, who once again, have been fully compliant with the Communications Act as well as all of the existing rules, regulations, and policies of the FCC.

8. The FCC's proposal to grant primary status to LPFM stations over FM translator stations is also flawed because the FCC falsely presumes that an LPFM station will better serve local communities. The quality of service as well as the longevity of LPFM stations is at best

speculative while commercial FM translators already rebroadcast a locally received over the air signal from a full power local FM station. Moreover, many noncommercial educational FM translator stations serve rural and/or underserved areas with few or no aural services. These noncommercial educational FM translator stations allow local and non-local noncommercial educational full power FM stations to expand their local signals to reach these rural and/or underserved areas, bringing much needed diversity of voices to these areas. Without these noncommercial educational FM translator stations, many of these communities would not receive any aural service because these communities are unable to support a local full power or LPFM station due to a lack of population, which in turn results in insufficient economies.⁹

9. Furthermore, LPFM applications should not be given primary status regardless of how many hours of local programming is originated because there is absolutely no empirical evidence in the record to show that locally originated programming better serves local communities. In fact, the FCC has found previously that localism can be enhanced by non-locally originated programming because it facilitates efficiencies and cost savings. *Id.* at paras. 484-486. The FCC recognized that “common ownership of stations may result in consumer welfare enhancing efficiencies” by eliminating “redundant studio and office space, equipment, and personnel” and increasing “opportunities for cross-promotion and counter-programming.” *Id.* at para. 147.

Numerous noncommercial educational FM translator stations (which can receive its programming by satellite) also employ these efficiencies and cost savings which translate into superior programming that serves the interests of local communities.

⁹ FM translator stations play a vital role in the broadcast service by providing not only local content but quality of service as well as diversity of content. However, in its desire to expand the LPFM service, the FCC has placed FM translator stations -- vital components of the broadcast service -- in jeopardy because the FCC’s current rules allow the displacement of FM translator stations with service areas that extend beyond the protected 60dbu contour, including those that are an integral part of a broadcast system designed to reach remote communities via intermediate links in a series of FM translator stations. The FCC’s current rules also do not protect an FM translator station that cannot place a 60dbu over its community of license due to intervening terrain but none-the-less serves the community.

10. In addition, while FM translator stations can be displaced by full power FM stations for the greater good of providing more service to more listeners, LPFM stations, should they be granted primary status, will foreclose the institution of new full power FM services. The FCC created the LPFM service in order to create new broadcast voices to serve local communities and underrepresented groups while preserving the integrity of existing full power FM stations. *See e.g., LPFM Report and Order*, at para. 62. The FCC specifically found that “LPFM stations, with their much smaller service areas and fewer service regulations, should not prevent FM stations from modifying or upgrading their facilities, nor should they preclude opportunities for new full-service stations.” *Id.* In fact, the FCC refused to reconsider its decision not to grant primary status to LPFM stations. *Creation of Low Power Radio Service, Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 19,208, at para. 28 (2000) (“On of ... [the FCC’s] paramount goals in introducing LPFM service was that it not interfere with existing service.”). *Id.* Granting LPFM stations primary status would completely contravene these goals.

11. However, in the event that LPFM stations and LPFM applications are given primary status, the FCC must provide grandfathered protection to FM translator stations that are already licensed as well as to all FM translator applications already on file with the FCC, whether they are singletons or mutually exclusive applications. If the FCC grants LPFM stations and LPFM applications primary status, it would be tantamount to revoking the licenses and permits of any existing or proposed FM translator station that conflicts with such a LPFM station or application since the affected FM translator station or application would be forced off the air or unable to bring service to the proposed local community. Such action by the FCC would be contrary to the public interest, convenience and necessity -- especially in light of the fact that the FCC has never before revoked a license or construction permit from a licensee or permittee who has done no

wrong. The FCC is only authorized to revoke a license or construction permit for a bad act that generally requires a “knowing” or “willful” bad act. 47 U.S.C. §312(a)-(b). In the case of existing and proposed FM translator stations that may be displaced by LPFM stations with primary status, the FM translator station licensees and permittees have been fully compliant with the Communications Act as well as all of the existing rules, regulations, and policies of the FCC. Accordingly, the FCC must grandfather existing FM translator licensees and permittees.

12. Should the FCC grant LPFM stations primary status, the FCC should only do so prospectively and the FCC must at least provide existing FM translator stations and applicants an opportunity to either demonstrate to the FCC that the subject FM translator better serves the public interest than the proposed LPFM station or technically resolve the short spacing to the proposed LPFM station by modifying the subject FM translator station. For example, the FCC could adopt a procedure whereby the existing FM translator station licensee, permittee, or applicant has an opportunity to demonstrate that the subject FM translator station will better service the public interest by, for example, providing aural service to a greater number of the listening public than the proposed LPFM station.

13. The FCC adopted a similar procedure when it increased the minimum Class C antenna height requirements, created the intermediate C0 station class, and reclassified all Class C FM stations that failed to meet the new Class C minimum antenna height requirements. 1998 Biennial Regulatory Review – *Streamlining of Radio Technical Rules, Second Report and Order*, 15 FCC Rcd 21,649 (2000) (“*Class C0 Second Report and Order*”). In the case of Class C0 FM stations, the FCC adopted a reclassification procedure that is only triggered when there is a specific, conflicting demand for the frequency (i.e., when an application for construction permit or a rule making to amend the FM Table of Allotments is filed that requires the downgrade of a

Class C station to a Class C0 station). If and only in the event of such a conflicting demand, the FCC provided the affected Class C station an opportunity to preserve its Class C status by modifying its facilities to meet the new Class C requirements. Finding that the downgrade of all Class C stations that do not meet the FCC's new Class C requirements in the congested FM band would not provide many opportunities to introduce new FM service, especially in the major markets, the FCC adopted this "triggering" approach instead of a sweeping automatic downgrading approach in order to avoid needlessly disrupting existing Class C stations because the demand for the conflicting frequencies is so limited. *Id.* at para. 16. In the case of LPFM stations, there is little or no demand for frequencies that conflict with the resulting FM translator stations from the 2003 FM Translator Filing Window. *See* Exhibits 1-3; *see* discussion *supra* at para. 4 *et seq.*

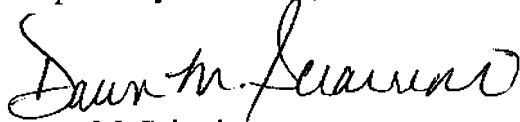
14. LPFM stations must not be allowed to operate if there is predicted interference within the 70 dBu contour of an "encroaching" second- or third-adjacent channel full service FM station.

As discussed *supra*, the goal of protecting full power FM stations is paramount. Therefore, the FCC must not permit LPFM stations to interfere with full power FM stations. *See* discussion *supra* at para. 10.

15. The FCC should not extend the freeze of all pending applications for new FM translator construction permits that were filed in the 2003 FM Translator Filing Window. Since it has been demonstrated that the LPFM service has not been precluded by the Auction 83 FM Translator Facilities, and there is no evidence in the record to show that there will be a preclusive effect in the future, the FCC must not extend the freeze of the pending applications for FM translator stations that were filed in the 2003 FM Translator Filing Window.

WHEREFORE, Edgewater Broadcasting, Inc. and Radio Assist Ministry, Inc. respectfully submit the foregoing for the Commission's consideration.

Respectfully Submitted,



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